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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>AARON CLAYTON ROBINSON,<br>Defendant and Appellant. | A150632<br><br>(Contra Costa County<br>Super. Ct. No. 5-151156-7) |

Aaron Clayton Robinson shot and killed Dominique Thomas, a neighborhood gang member, allegedly in self-defense. A jury convicted him of voluntary manslaughter and found he personally used a firearm in committing the offense. Robinson argues (1) the standard instructions on justifiable homicide in self-defense are flawed; (2) the trial court abused its discretion by excluding various pieces of evidence; and (3) the case should be remanded so the court can consider whether to strike the firearm enhancement under a 2017 amendment to Penal Code section 12022.5, subdivision (c).[1] We agree the case should be remanded to consider the firearm enhancement, but we otherwise affirm the conviction.

## BACKGROUND

Robinson was charged by information with the October 29, 2014 murder of Thomas (§ 187, subd. (a)), and it was alleged he personally and intentionally discharged a

[1] Undesignated statutory references are to the Penal Code.

firearm, causing great bodily injury or death (§ 12022.53, subd. (d)). At trial, Robinson admitted he shot and killed Thomas but maintained it was in self-defense.

Thomas was a leader in the Dime Block gang, which sold drugs and committed violent crimes in the West 10th Street corridor of Pittsburg. Thomas was known to carry a gun and commit violence, including shootings and unprovoked attacks, for the benefit of the gang. From 2012 until the shooting, Robinson attributed several acts of intimidation and violence against him to Thomas and Dime Block members (addressed in more detail in part III of the Discussion). In the months prior to Thomas's death, Thomas robbed and punched a person, struck and threatened to kill his (Thomas's) mother and pistol-whipped and threatened to kill her husband, and later pointed a gun at his mother while stopped in a separate vehicle at an intersection, causing his mother to obtain a restraining order against him.

Robinson moved into the West 10th Street neighborhood in high school. He testified he initially was friendly with Thomas, but in 2012 Thomas and four Dime Block members visited him and made statements that led him to believe he could no longer associate with a friend named J.T. Robinson initially avoided J.T. but started having contact with him again in late 2012.

In January 2013, Robinson was involved in an altercation with a group of men outside La Aurora Market at West 10th Street and West Street and shots were fired, injuring a passerby. At the time, Robinson told a police officer he did not recognize the person who shot at him. At trial, Robinson testified the shooter was Thomas.

In February 2013, somebody fired several shots at the home of Robinson's mother, where Robinson had previously lived. The next day, in the cul-de-sac where the home is located, Robinson exchanged gunfire with the occupants of a car. Police asked Robinson to contact him about the shooting, but he never did. At trial, Robinson testified Thomas and other Dime Block gang members were in the car. He admitted firing back with a .45 caliber handgun he was carrying. Three character witnesses said Robinson did not have a reputation for violence or aggression.

Robinson testified that, on the day of the shooting, October 29, 2014, he was with acquaintances on a street near West 10th Street when Thomas approached the group. As Thomas walked by him, Robinson said he saw Thomas pull up his shirt and grab a gun in his waistband. Robinson thought Thomas was going to shoot him; so he grabbed his own gun and started shooting Thomas. Robinson acknowledged following Thomas around a parked car as he fired bullets in rapid succession and reloaded his gun, but he could not recall other details about the shooting.

Thomas was dead when police arrived. Thomas had 11 gunshot wounds, including wounds to his head, back, arms, chest, right thigh, and abdomen. None of the shots were fired at close range, and prosecution and defense experts agreed Thomas was in motion and alive when shot. A shot that perforated both sides of Thomas's brain was almost instantly incapacitating and would have caused him to drop if he was still standing. A prosecution expert opined Thomas was shot in the head from above while he was lying on the ground, one arm wound was defensive, and most other wounds were inflicted as Thomas moved away from the shooter; a defense expert disputed all of these points.

There was no gun by Thomas's body, and no weapons or ammunition were found in Thomas's vehicle. Photographs suggested Thomas had gunshot residue on his hands, but swabs of his hands were never tested. Twelve cartridge casings were found at the crime scene, all .40 caliber casings fired from the same gun. An empty magazine found by Thomas's body was designed to hold eight rounds of .40 caliber bullets. Photographs on Robinson's phone when he was arrested showed guns and a magazine similar to those used in the crime and also showed Robinson holding other guns.

The prosecutor argued Thomas was unarmed, and Robinson shot him as a form a vigilante justice, not out of fear of imminent harm. The defense argued Thomas was armed, and Robinson shot him in self-defense. The jury found Robinson guilty of voluntary manslaughter (§ 192, subd. (a)) and that he personally used a firearm in committing the offense (§ 12022.5, subd. (a)). Robinson was sentenced to the middle

term of six years for the manslaughter conviction and a consecutive four-year middle term for the firearm enhancement, for a total of 10 years in prison.

## DISCUSSION

### I.

*Self-defense with Mixed Motives*

Robinson argues a standard instruction on self-defense used by the trial court, CALCRIM No. 505, "is legally incorrect because it fails to explain causation and . . . wholly precludes self-defense to those who act with mixed motives." We disagree.

Robinson has not forfeited the issue despite failing to raise it in the trial court. If an instruction is legally correct, and a party merely seeks additional or clarifying instructions, he must first do so in the trial court or forfeit the claim. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.) But if an instruction is legally incorrect, as Robinson argues here, he may raise the issue for the first time on appeal. (*Id*. at p.1012.) We independently review whether instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

CALCRIM No. 505 states in part that a defendant is justified in killing somebody in self-defense if the defendant "believed there was imminent danger of death or great bodily harm to himself" and the defendant "acted *only because of that belief*." (Italics added.) The instruction is based on sections 197 and 198. Section 197 states a homicide is justifiable "[w]hen committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony . . . ." Section 198 adds "the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of *such fears alone*." (Italics added.)

Robinson concedes the instruction accurately reflects the language in section 198 that the party killing must have acted on fear alone. But he contends the instruction misinterprets section 198 by excluding other contributing causes. "[B]ecause there was a question of whether [he] was motivated to shoot Thomas based solely on fear or a combination of motives, the jury should have been instructed, consistent with traditional

principles of causation, that an otherwise meritorious self-defense claim is only defeated by the presence of another motive when: 1) the killing would not have occurred but-for the existence of some other motive besides reasonable fear; and 2) that other motive was a substantial factor in the killing."

In *People v. Trevino* (1988) 200 Cal.App.3d 874, 878–879, the Court of Appeal rejected a similar argument and held the "fear alone" language is a correct statement of law. The *Trevino* court explained the law does not preclude self-defense merely because "a person feels anger or even hatred toward the person killed." (*Id*. at p. 879.) "The party killing is not precluded from feeling anger or other emotions save and except fear; however, those other emotions cannot be causal factors in his decision to use deadly force. If they are, the homicide cannot be justified on a theory of self-defense. But if the only causation of the killing was the reasonable fear that there was an imminent danger of death or great bodily injury, then the use of deadly force in self-defense is proper, regardless of what other emotions the party who kills may have been feeling, but not acting upon." (*Ibid*.)

Recently, our Supreme Court drew this same distinction between actions and emotions when it held a defendant is not entitled to assert self-defense if "he did not act on the basis of fear alone but also on a desire to kill his rival." *People v. Nguyen* (2015) 61 Cal.4th 1015, 1044 (*Nguyen*). The killing at issue in *Nguyen* involved rival gang members, both of whom were armed, and the defendant contended the evidence established self-defense as a matter of law. (*Id.* at pp. 1033, 1044.) Quoting with approval *Trevino*'s discussion of actions and emotions, the *Nguyen* court explained section 198 requires the party killing to demonstrate he acted because of reasonable fear "alone." (*Id*. at pp. 1044–1045.) Thus, "it was for the jury to decide whether defendant acted out of fear alone when he shot and killed" the rival gang member. (*Id*. at p. 1045.)

Robinson cites a passage in *Nguyen* where the Supreme Court remarked on an issue that was not before it: "We note that defendant did not argue . . . that the jury should have been instructed that acting based on mixed motives is permissible so long as reasonable fear was the but-for cause of his decision to kill. We therefore have no

occasion to consider whether such a rule would be consistent with [prior interpretations of] section 198 . . . ." (*Nguyen, supra,* 61 Cal.4th at p. 1046.) Robinson invites us to interpret section 198 to permit a defendant to claim self-defense despite having mixed motives.

We decline the invitation and, instead, follow the holdings in *Nguyen* and *Trevino*. Section 198 requires self-defense to be based on a reasonable fear alone. (*Nguyen, supra,* 61 Cal.4th at pp. 1044–1045; *Trevino, supra,* 200 Cal.App.3d at p. 879.) It does not preclude a defendant from harboring anger or hatred of the victim so long as the defendant does not act on those emotions. (*Nguyen*, at pp. 1044–1045; *Trevino,* at p. 879.) If we accepted Robinson's argument, we would contradict the plain language of section 198: rather than acting on fear alone, a defendant could assert self-defense despite acting, in part, on a desire to kill the victim. (See *Nguyen,* at p. 1044 [holding self-defense is not available to a defendant who does not "act on the basis of fear alone but also on a desire to kill his rival"].) It is not our role to rewrite the statute. CALCRIM No. 505 correctly states the law.

Finally, Robinson suggests *Nguyen*'s reasoning is flawed because it does not consider common law principles of multiple causation incorporated into other areas of criminal law. (See *People v. Jennings* (2010) 50 Cal.4th 616, 644, fn. 13.) However, unlike in the cases Robinson cites, the statute at issue here *expressly* requires sole causation. (§ 198 ["must have acted under the influence of such fears *alone*" (italics added)].) Robinson also argues state and federal constitutional principles require a change in the instruction. While he cites authority for the existence of a constitutional right to self-defense (*McDonald v. Chicago* (2010) 561 U.S. 742, 767; *People v. McDonnell* (1917) 32 Cal.App. 694, 704), he cites no authority that the constitutional right to self-defense applies even when the defendant acted, in part, for reasons other than self-defense.[2]

[2] We reject as moot Robinson's belt-and-suspenders argument that, assuming the instruction was erroneous, trial counsel's failure to object to the instruction amounts to ineffective assistance.

## II.

*Use of Deadly Force*

The standard self-defense instruction also states a homicide is justified only if the defendant "used no more force than was reasonably necessary to defend against that danger." (CALCRIM No. 505.) Robinson argues this language does not logically apply in self-defense cases where the defendant made a reasonable decision to use deadly force. According to Robinson, such a rule is absurd: "Deadly force is already the maximum amount of force that an individual can use to defend himself; there is no principled basis for parsing it into degrees."

We disagree. Using deadly force may be reasonable at the onset of an attack but become unreasonable as the situation changes, such as when the victim quits fighting or is subdued. (E.g., *People v. Beyea* (1974) 38 Cal.App.3d 176, 190 ["jury could well conclude that defendants used excessive force and continued to do so long after the decedent had been disabled"], disapproved on other grounds by *People v. Blacksher* (2011) 52 Cal.4th 769, 808; *Beyea*, at pp. 186–190; *People v. McCurdy* (1934) 140 Cal.App. 499, 503 [although "defendant may have fired the first shot in self-defense, disabling his assailant, he was not justified in continuing firing or in fatally wounding the assailed, particularly while the deceased lay upon the floor"].) It is true that "the law does not weigh in too nice scales the conduct of the assailed" in a self-defense case (*People v. Hecker* (1895) 109 Cal. 451, 467; *People v. Mercer* (1962) 210 Cal.App.2d 153, 161 [reviewing cases upholding self-defense claims despite several lethal blows or gunshots]), but it also does not give the assailed carte blanche to kill when once faced with a lethal threat.[3]

## III.

*Exclusion of Evidence*

We disagree with Robinson that the trial court erred in excluding several prior violent acts by Thomas or Dime Block gang members.

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[3] We reject as moot Robinson's argument that his trial counsel was ineffective because he failed to object to the instruction.

Although similar evidence was admitted, Robinson claims the exclusion of additional evidence gave the jury a sanitized view of Thomas and his gang and thus misled the jury on the objective grounds for Robinson's fear of Thomas at the moment of the shooting.

The trial court has broad discretion to exclude evidence if its probative value is outweighed by the substantial danger of undue prejudice, or may confuse the jury, or would consume an undue amount of time. (Evid. Code, § 352.) We review such evidentiary decisions for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Objections to the exclusion of evidence are forfeited unless adequately raised in the trial court. (Evid. Code, § 354.)

**A.**

The evidentiary rulings Robinson challenges fall into three categories, the first of which concerns threats by Thomas or other gang members against Robinson or his family.

Although the court admitted evidence of an implied threat when gang members visited Robinson in 2012, Robinson argues exact language used by the gang members (purportedly that he was "86'd" from the neighborhood) should also have been admitted. The evidence was excluded as hearsay, and Robinson merely cites to the transcript without explaining why that hearsay ruling was incorrect. The argument is forfeited. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115–1116 [claim on appeal may be denied if unsupported by legal argument applying legal principles to the particular facts of the case]; *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 690, fn. 18 [" 'appellant cannot rely on incorporation of trial court papers, but must tender arguments in the appellate briefs' " (italics omitted)].)[4]

Robinson's second claimed error in this category is the exclusion of a 2011 shooting of him by an associate of Thomas, Jeremiah Hernandez. Robinson did not ask

[4] In any event, there was no prejudice because Robinson was permitted to testify that, following this incident and another conflict with the gang in which Thomas fired a gun at him, "it appeared to me that I was 86'd from the neighborhood, as they call it."

the court before trial to admit evidence of the incident. When he started testifying about the incident, the court held an off-the-record sidebar, sustained an objection, and instructed the jury to disregard the testimony, stating, "[I]t's not related to our incident at all." Robinson does not challenge this relevance ruling or demonstrate his trial counsel preserved the issue by placing the parties' arguments on the record outside the presence of the jury. The argument is forfeited.

**B.**

In another category of evidence, multiple acts of violence by Thomas against others were admitted. For example, the court admitted evidence Thomas was convicted for firearm possession with a gang enhancement, robbed and punched his girlfriend's friend, pistol-whipped his mother and her husband, and pointed a gun at his mother.

Robinson argues the court erred in excluding evidence of a March 2013 incident when Thomas shot and killed a rival gang member who had confronted him at a gas station in another part of the state. There was extensive pretrial argument about this incident, which the court excluded because Thomas had apparently acted in self-defense, leading prosecutors to charge the surviving rival gang members with provocative act murder rather than charging Thomas with any form of homicide. Given that Thomas was deemed not at fault, the court concluded any probative value of the evidence was outweighed the potential for delay and confusion caused by arguing about whether Thomas was correctly exonerated. Robinson does not acknowledge the court's reasons for excluding the evidence or challenge the reasoning on appeal.

Robinson argues evidence should have been admitted that Thomas showed a video of this killing around the neighborhood and bragged he beat a murder rap. The court excluded that evidence because it would be confusing without an explanation of the underlying shooting. Again, Robinson does not acknowledge this rationale or challenge it on appeal. He therefore fails to establish error on appeal.

**C.**

In the final category of evidence, the court admitted general testimony about the violent nature of the Dime Block gang by a gang police officer. The officer testified the

gang engaged in drug sales, robberies, and violent crimes against people including shootings, murder, and random acts of violence against civilians. Gang members controlled their territory by instilling fear in civilians and rival gangs and they commonly carried guns. The officer testified, while working undercover, he was personally assaulted by Dime Block members without provocation. The jury also saw a videorecording of Dime Block members talking about turning the neighborhood into a war zone, terrorizing the streets, loving to shoot, and keeping a big weapon—"Drive to the ten, you can catch a couple to the face." The jury also saw photographs of Thomas and other gang members holding guns with "shooter" hashtags or comments.

Robinson complains several other acts of violence by Dime Block gang members were not admitted. First, he cites July 4, 2009 unprovoked beatings of civilians by a group of people shouting gang slogans. When the evidence was discussed before trial, the court was concerned it would be too time consuming, but reserved ruling, noting the incident might be admissible as a predicate act in the context of the gang officer's testimony. Similarly, the court excluded evidence of violent acts for which three other gang members were convicted as unduly time consuming but stated they might be admissible as predicate acts with respect to the gang officer's testimony. Robinson did not elicit the incidents during the gang officer's testimony and so has forfeited any claims of error.

Robinson also cites three excluded incidents from 2009 that involved gun play (firing guns into the ground and hiding guns and ammunition), vandalism (shooting street lamps and car windows), and verbal harassment (calling someone a snitch and rattling his door). The trial court reasonably excluded these incidents as remote, not very probative of a reputation or character for deadly violence, and unduly time consuming. Robinson again does not address the grounds for the ruling and therefore has forfeited his claim of error.

In sum, the court's evidentiary rulings did not violate Robinson's right to present evidence in his own defense (*Crane v. Kentucky* (1986) 476 U.S. 683, 690–691), or give the jury a misleading impression of Thomas and his gang. It is understandable that

Robinson tried to admit this evidence, which generally was relevant to his defense. However, the trial court admitted a considerable amount of evidence in all three categories, and Robinson used it to make his arguments to the jury. When the court excluded evidence, it gave thoughtful reasons for doing so. Several excluded incidents took place more than five years before the charged offense, or in another part of the state, and several involved juvenile acts of vandalism or harassment, not murder or assault. The trial court did not err.

## IV.

*Firearm Enhancement*

Robinson argues, and the People concede, the case should be remanded because a 2017 amendment to section 12022.5, subdivision (c) allows the trial court to decide whether the firearm enhancement should be stricken. We agree a remand is appropriate. (See *People v. Vela* (2018) 21 Cal.App.5th 1099, 1113–1114.)

## DISPOSITION

The conviction is affirmed, but the case is remanded for the trial court to consider whether to strike the firearm enhancement pursuant to section 12022.5, subdivision (c).

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.